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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1280

JAMES F. REYNOLDS, *Petitioner,*

— against —

COMMISSIONER OF COMMERCE AND DEVELOPMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JOHN HENRY BREBBIA
DELMAR W. HOLLOMAN
Davies, Richberg, Tydings,
Landa & Duff
1000 Vermont Avenue, N. W.
Washington, D. C. 20005
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

James F. Reynolds prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the above-entitled cause on February 4, 1966.

OPINIONS BELOW

The order of the Superior Court was rendered without opinion. The opinion of the Supreme Judicial Court (App. B, infra.) has not yet been officially reported, but can be cited as *Mass. Adv. Sh.* 1966, 167.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3) since the action of a state agency has impaired a contract right and thereby deprived the petitioner of a property right without due process of law in violation of the Constitution of the United States. This petition is timely, the order of the court below having been entered on February 4, 1966.

QUESTIONS PRESENTED

1. Whether the action of the State Commerce Commissioner in suspending petitioner from State employment without affording him proper notice and hearing violates the Contracts Clause of Article I, Section 10 of the United States Constitution?

2. Whether said action of the State Commerce Commissioner also deprived petitioner of a property right in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

STATUTES INVOLVED

The statutory provisions involved are the Massachusetts General Laws Chapter 30, Sections 9A and 59 (the "Perry Law"); Chapter 31, Sections 43 and 45. The text of these sections is set forth in Appendices C, D and E.

STATEMENT

How Federal Question Is Presented

On June 11, 1958 petitioner's appointment as Deputy Commissioner of Commerce of the Commonwealth of Massachusetts was approved by the Executive Council in compliance with Mass. G.L. c. 23A, Section 3 (Amend., Pet. 4)[1] and on that date petitioner assumed the duties of his office. Petitioner was appointed on a permanent basis and as of June 1, 1964, having held the position for more than three years, thereby became entitled to, as a veteran, the benefits enumerated in Mass. G.L. c. 30, Section 9A (App. C, infra.). Section 9A provides that a veteran who has held this type of office for more than three years shall not be involuntarily separated from such office or position except in accordance with Mass. G.L. c. 31, Sections 43 and 45 which contain notice, hearing and appeal provisions (App. E, infra.).

On June 1, 1964 petitioner was suspended from office by the then Commissioner of Commerce on the grounds that he had been indicted for larceny. The suspension was affected by means of a letter and the action was taken according to the Commissioner's purported power under a 1962 Enactment, Mass. G.L. c. 31, Section 59, known as the "Perry Law". The latter Section permits an appointing authority, if he so chooses, to suspend an indicted officer or employee during the

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[1] Since the record as filed in this Court is not paginated reference relates to a particular document filed therein: Amended Petition For Mandamus (Amend. Pet.).

period in which he is under indictment. It provides that the suspension takes affect automatically after written notice is given and it lasts until said person is notified of its removal. It cautions that: "A suspension under this section shall not, in any way, be used to prejudice the rights of the suspended person either civilly or criminally" (App. D, infra. 5a).

Petitioner was subsequently convicted and ordered to make restitution in the amount of $251.40. Restitution was made and on March 24, 1965 petitioner made written demand upon the Commissioner to reinstate him to his position as Deputy Commissioner which has not been done.

On May 11, 1965 petitioner filed an Amended Petition For Mandamus in the Superior Court for Suffolk County asking that the court order the Commissioner:

(a) To reinstate petitioner to his position.

(b) Assign petitioner duties consistent with his position.

(c) Authorize payment of petitioner's wages.

The Amended Petition further requested compensation for lost wages and any other relief the court deemed appropriate. It alleged that petitioner had been denied his rights to proper notice and hearing under G.L. c. 31, Sections 43 and 45 and that there was no other "effective and adequate remedy" available to him (Amend. Pet. 2-3).

Respondent demurred to each count of the Amended Petition and asserted that the tenure provisions of G.L. c. 30, Section 9A did not exempt petitioner from suspension under the Perry Law (Amend. Pet. 17).

On June 18, 1965 the Superior Court, without opinion, entered a Final Decree dismissing the Amended Petition and petitioner filed its appeal therefrom to the state Supreme Judicial Court on June 21, 1965, alleging that his rights had been denied (Amend. Pet. 19).

The Supreme Judicial Court affirmed the order sustaining the demurrer and ordered the Superior Court judgment affirmed on February 4, 1966. In its opinion the court referred to petitioner's contention that applying the Perry Law to him impaired the obligation of the contract governing his employment in violation of Article 1, Section 10, of the Constitution of the United States (App. B, infra. 2a). It concluded that the enactment of the Perry Law, under whose provisions petitioner was removed from office, was clearly within the state's "retained legislative power of regulation" and as such the suspension constituted a proper exercise of the police power (App. B, infra. 3a). Thus, the highest state court passed upon the Contracts Clause question which was before it.

Having decided that by applying the Perry Law to petitioner the state did not unlawfully interfere with his constitutional rights, the state court has thereby made any inquiry into how and when the federal question was raised irrelevant to this Court's exercise of jurisdiction. "Where it appears that from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided

by that court," *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U.S. 182, 185-6 (1945).

In addition to passing upon the question as to whether petitioner's contractual rights had been interferred with in a manner repugnant to the Contracts Clause of the federal constitution the state court also, for the first time, raised a question as to whether petitioner's rights under the "due process" clause had been violated. The latter question arose when the said court failed to consider the above-quoted proviso contained in the Perry Law stating that a suspension thereunder could not be used to prejudice a suspended person's civil rights.

Rights to notice and a hearing are certainly to be considered in the realm of civil rights. Therefore, if the proviso was meant, as it literally reads, to preserve petitioner's rights to notice and a hearing before a suspension was permitted, then he was deprived of a property right, which is contractual in nature, without due process of law and the issue is a proper one for appeal.

REASONS FOR GRANTING THE WRIT

I. The State Court's Denial of Petitioner's Vested Contractual Rights Constitues a Violation of Article 1, Section 10 of the U. S. Constitution and Conflicts With Decisions of This Court

It is of the utmost importance that this Court safeguard the petitioner's contractual rights which he has acquired by law and upon which he was allowed to rely when he accepted employment with the Mass. Department of Commerce. As has already been explained, the petitioner, as a veteran with more than three years' service, became entitled to the protection of Mass. G.L. c. 31, Sections 43 and 45 prior to being in-

voluntarily separated from his position with the commerce department. Basically, these sections provide a person serving under permanent appointment, such as petitioner, with unlimited tenure. Such a person cannot be "suspended for a period exceeding five days . . . except for just cause and for reasons specifically given him in writing." Further, before a suspension can be affected, he must be provided the reason therefor in writing and a full hearing before the appointing authority on the specific reason or reasons given. He must also be given at least three days' notice of the hearing and written notice of the decision, fully specifying the ground upon which it is based, within two days after completion thereof. If the suspended person makes written request he is entitled to a civil service commission hearing and, upon failure to reinstate, judicial review by either the Municipal Court of Boston or the district court where he resides. Finally, if the suspension proves unwarranted he can obtain reimbursement for legal expenses incurred in defending himself (App. E, infra.).

The question of whether or not property rights, such as those in question, granted under G.L. c. 31 are contractual in nature was settled by the Mass. Supreme Judicial Court in a 1965 opinion concerning an action of contract brought by two suspended policemen against a local city government. Therein, plaintiffs were suspended by the chief of police for allegedly having received stolen property and were advised that a hearing would be held by the Mayor on a given date wherein they were to show cause why they should not be discharged. In contravention of their rights under G.L. c. 31, Sections 43 and 45 neither one was given written notice of the reasons for his suspension nor of his

rights to a hearing and review. Because of this, the court held that plaintiffs were entitled to recover in an action of contract the salaries each would have earned from the date of the suspension until the date of the first scheduled hearing. The court also held that if plaintiffs were in fact denied their remedies under c. 31 they could, by mandamus, obtain reinstatement, *Huntoon* v. *Quincy,* 349 Mass. 9 (567-8).[2]

In the decision at bar the court indicated that even if the right to proper notice and hearing was considered to be contractual, petitioner's suspension under the Perry Law provisions did not constitute an unconstitutional impairment of the obligation of contract governing his employment. It implied that the passage of the Perry Law, which allows the state to deprive individuals of their contractual rights to notice and hearing, was within the reserved power of the state and constituted a proper exercise of its police power (App. B, infra. 3a). The latter conclusion is based on several erroneous premises which on closer examination will illustrate not only the unconstitutionality of the state's action in so suspending petitioner but also the importance of this Court's granting the petition.

In its opinion the state court indicates that it had previously decided the question as to whether the Perry Law permits suspension of persons subject to "civil service", such as petitioner, without providing them with their rights to proper notice and hearing (App. B, infra. 2a). But, in neither the case referred to, *Bessette* v. *Commissioner of Public Works,* 204 N.E. 2d 909, nor in the present case, did the court mention the

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[2] See also *Ransom* v. *City of Boston,* 192 Mass. 298, 307.

edict contained in the Perry Law to the effect that suspension thereunder "shall not" be used, in any way, to prejudice the rights of the suspended person either civilly or criminally. In *Bessette,* supra, the question was moot because the petitioner's job was abolished in a reorganization, but no such situation occurred herein and yet, the same court treated the proviso as if it did not exist. This appears all the more curious when one considers the fact that the last sentence of the letter notifying petitioner of his suspension specifically referred to the proviso stating: "As is provided in said Statute, this suspension is not to be in any way used to prejudice your rights either civilly or criminally (Amend. Pet. 14)."

In the decision herein, the court indicated that it felt the Perry Law *required* that an indicted official ". . . [Shall] be separated from the office pending trial," yet the language of the statute states specifically that under such circumstances the individual *may* be suspended (App. D, infra. 4a). The use of the word *may* makes it obvious that the legislature did not intended to make it compulsory to suspend indicted officials. Indeed it would be an inherent contradiction to state that such persons must be suspended, without notice and hearings, even though their right to such procedural protection had vested, and then to direct that suspensions rendered in such a manner were not to be used to prejudice their civil rights.

The plight of the petitioner here is almost identical to that in *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95 (1938). Therein, the Indiana legislature, in 1933, had amended a prior Teacher's Tenure Act under which teachers obtained permanent status after five years thus causing their contracts to become "indefinite"

in nature and remain in force until new ones were signed. The school authorities were threatening to cancel the contract of a teacher who had attained permanent status and she filed a mandamus action alleging that any such cancellation would constitute a breach of contract. She asked that the school authorities be compelled to retain her as a teacher. Respondent demurred and the demurrer was sustained. Petitioner appealed to the state supreme court wherein the judgment was sustained on the grounds that the act granting tenure had been repealed for teachers in her situation and that the prior legislation had not given her a vested right which could not be impaired under the Constitution. *Id.* at 98.

This Court assumed jurisdiction stating that, "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment." *Id.* at 98. The same is true of this case for the state court decided that the suspension of petitioner without affording him his rights to notice and a hearing did not impair the obligation of contract governing his employment as is guaranteed in Article 1, Section 10 of the U. S. Constitution (App. B, infra. 2a-3a).

In the *Anderson* case, supra, the argument was made that in repealing the act with regard to tenure the legislature was validly exercising the reserved power of the state, as every contract is subject to the police power, 303 U.S. at 107. The same argument was made by the state court in this case (App. B, infra. 3a). In answer to that argument this Court stated that it

was aware that all contracts were made subject to being frustrated by the proper exercise of the state's police power but that, "in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end," 303 U.S. at 109, citing *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 438 (1934). In so deciding, this Court was persuaded by the fact that the tenure act gave the school corporation the power to cancel a teacher's indefinite contract for any just and good cause so long as it complied with the notice and hearings provisions contained therein. The problem was identical to the one presented in this petition. For, not only could the present petitioner have been suspended for any good cause but the statute makes it clear that the suspension could have been accomplished within a week's time if the appointing authority so decided.[3]

Under identical circumstances wherein there remained unlimited power to dismiss for good cause, this Court reasoned that "the repeal of the earlier act was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed," and reversed the case, 303 U.S. at 109. Despite the foregoing, the state court, herein, has held that the Perry Law "fully complies with the standard thus stated in the *Anderson* case" (App. B, infra. 3a).

[3] All the state had to do to properly suspend petitioner was to give him written notice of the reason or reasons why suspension was being contemplated along with three days' notice of the hearing. Assuming the hearing was held on the first possible day, suspension could have been effected in less than a week's time if the appointing authority so decided (App. E, infra, 6a-7a). Thus, the suspension would have been in effect while petitioner, if he chose to, pursued his appellate rights.

It therefore becomes imperative that this Court grant the petition in order that it may decide whether or not the Perry Law, as interpreted by the state court, did, in fact, unlawfully deprive petitioner of his right to proper notice and hearing prior to being suspended, contrary to the principles of the *Anderson* case.

It is obvious, in light of the Perry Law edict against prejudicing a person's civil rights, that the law was not intended to deprive petitioner of his rights to proper notice and hearing. Yet, even if such was the intention of the legislature; then, as will be seen, the state court still erred in not striking it down as being in violation of the Contracts Clause of the Constitution.

In support of its position the state court points to this court's decision in *El Paso* v. *Simmons,* 379 U.S. 497, 508-509 (1965), which in turn relied on *Home Building & Loan Ass'n,* supra. An examination of these two decisions will disclose the improper interpretations which must have been placed on them by the state court when it erroneously concluded that petitioner's rights had not been impaired contrary to this court's holding in the *Anderson* case, supra.

In its earlier decision in *Home Building & Loan Ass'n,* this court was faced with a depression year calamity in the State of Minnesota with all of its attendent consequences. As one means of meeting the emergency the state enacted a Mortgage Moratorium Law which allowed for the extension of periods of redemption of up to two years on existing mortgages. Under the law the mortgagee was to be paid the reasonable rental value, as fixed by the court, during the extension period. Aside from the extension of time none of the other conditions of redemption were altered. The state court conceded an impairment under

Article 1, Section 10 of the Constitution but stated that the action fell within the proper exercise of the state's police power as a result of the state of emergency found to exist by the legislature.

This Court, in upholding the constitutionality of the moratorium law, pointed out that there was a difference between "the obligation of a contract, and the remedy given by the legislature to enforce that obligation," and that the *remedy* could be modified without impairing the obligation of a contract. It pointed out further that there was no fixed line between legitimate alterations of the remedy and those which purportedly do so but in effect actually impair substantial rights, *Id.* at 430. The Court emphasized that limited and temporary impositions with respect to the enforcement of contracts could be made necessary by great public calamity but had to be of a character appropriate to the emergency, *Id.* at 439, 444-5. In the case of the petitioner, herein, we are dealing not with a temporary or limited imposition but with the permanent abolition of a vested contractual right without compensation or relief of any kind for the person affected thereby.

In its recent decision in *El Paso* v. *Simmons,* supra, upon which the state court in the case at bar has relied, this Court again took up the question of the dividing line between "obligation" and "remedy". It went one step further than *Anderson* and stated that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause," 379 U.S. at 506-7. There the state of Texas had amended a thirty year old law which allowed reinstatement of certain land claims

for an unlimited time after default, assuming no third party intervened in the meantime. The amendment limited reinstatement to five years after default and this Court upheld it on the grounds that the economic interests of the state justified it in restricting a party to "those gains reasonably to be expected from the contract," notwithstanding the fact that there has been a technical alteration of an obligation of a contract, 379 U.S. at 515.

In the case at bar we have neither a "modification of a contractual promise" nor an "alteration of an existing remedy" as defined by this Court in the *Home Building & Loan Ass'n* and *El Paso* cases, what we have is the complete elimination of a contractual right. This is true because the state court did not interpret the Perry Law as changing or limiting the notice and hearing requirements for veterans who are under indictment but rather as abolishing them. Therefore, the result is the total destruction of a contractual right and as this court pointed out in the *Anderson* case, supra, such an action by the legislature could not constitute a valid exercise of the state's police power because there already existed ample machinery by the use of which the petitioner could have been expeditiously suspended. Furthermore, the legislature rejected the use of its police power when it added the proviso to the Perry Law amendment stating that suspensions thereunder were not to operate to prejudice a person's civil rights.

In view of the literal language of the Perry Law proviso and the state court's misinterpretation of the authorities cited in support of its decision, the petition should be granted.

II. The Perry Law, as Interpreted by the State's Highest Court, Operated to Deprive Petitioner of His Vested Right to Proper Notice and Hearing. Petitioner Has, Thereby, Been Deprived of a Property Right in Violation of the Due Process Clause.

The state court's opinion took the position that: "In effect, with respect to indicted officials like Reynolds, Sec. 59 [the Perry Law] merely substituted for the procedures of c. 31, Sec. 43(a), other procedures affording due process of law to the suspended official." But, a casual reading of the two sections makes such a suggestion difficult, if not impossible, to understand. Section 43(a) makes proper notice and hearing prior to suspension mandatory in the case of veterans, such as petitioner, with over three years' service. In the court's view Section 59 allows the appointing authority to suspend the same class of person, and deny his vested rights to proper notice and hearing, by summary process. If the court's view is correct, in the former case a vested right to due process in connection with suspensions was written into the statute and in the latter case the very same vested right was written out. Nevertheless, the court concluded that, in effect, the state merely substituted one procedure affording due process for another affording equal due process (App. B, infra. 3a).

In deciding that the Perry Law amendment provided for the same due process as the statute amended, the court may have been confused by the fact that it did provide for automatic reinstatement and back pay benefits to the suspended official if he was found not guilty. It is difficult to understand how the substitution of property rights which vest *after* suspension takes place, for property rights which vest *before* suspension takes place, can be considered to have satisfied the require-

ments of the Due Process Clause. To do so is to ignore the fact that the purpose for granting veterans vested rights to proper notice and hearing was obviously to insure that once they had three years of satisfactory service they could not be summarily suspended. As a matter of fact, the Perry Law, enacted after petitioner's rights had accrued to him, contains precise language indicating that, by its enactment, the elgislature did not intend to deprive veterans of their vested rights to proper notice and hearing. It expressly provides that suspensions under it "shall not, in any way, be used to prejudice the rights of the suspended person either civilly or criminally" (App. D, infra. 5a). Having chosen to ignore the proviso, the court was forced to the tortured conclusion that the due process requirements were satisfied without it. The proviso does exist. The court has chosen to ignore it. In so doing the court has permitted the state to deprive petitioner of his rights in violation of the Due Process Clause of the Constitution.

The court seems to advance the further argument that the federal due process requirements are satisfied by the Perry Law procedure because the enactment of the legislation was within the state's "retained legislative power of regulation." As authority for this proposition the court cites, Schwartz, Rights of Property, A Commentary on the Constitution (App. B, infra. 3a). Professor Schwartz postulates that, at the present time, it is a rare law indeed that is not considered to bear at least a reasonable relationship to ends which may be furthered by the police power. He suggests that contract rights have to yield to laws which seek to accomplish legitimate police power ends and that therefore the freedom of contract guaranteed

by the due process requirement "must give way to the ever-broadening reach of the police power," *Id.* at 285.

Although it is apparent from the wording of the proviso that the state legislature, in enacting the Perry Law, did not intend to exercise its police powers, nevertheless, had it intended to do so, it would not automatically have become immune from attack under the Due Process Clause, as is implied in the state court's opinion. This Court has ruled that, with regard to statutes causing the dismissal of state employees, not every exercise of the police power fulfills the requirements of the due process clause. In such cases public servants will still be protected from dismissal pursuant to a statute which is "patently arbitrary or discriminatory," *Weiman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *Ohio Bell Telephone Co.* v. *Commission*, 301 U.S. 292, 302 (1937). Further, this Court has held summary dismissals of public officials under later legislation, having tenure and being entitled to proper notice and hearings under prior legislation, as being in violation of due process of law, *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551, 559 (1956).

While we are not confronted with a dismissal in this case, we are confronted with a summary suspension which is as harmful to the petitioner as a dismissal. For this reason petitioner should be afforded the same measure of constitutional protection from being arbitrarily suspended as this Court affords to those who are arbitrarily dismissed.

Under the terms of the Perry Law a suspension can last forever. Under the state court's interpretation of the law, suspension is mandatory in the event of indictment. Therefore, the court has ruled that the ap-

pointing authority, in such cases, is required to deprive the person of his vested rights to proper notice and hearing. In the case of acquittal, the suspended person is automatically reinstated in his previous position but in cases, such as the present one, where the petitioner has been convicted there is no requirement that there be any further disposition of the case. Again, this is so despite the fact that the statute specifically provides that persons to be suspended will not be prejudiced thereby. Under the court's interpretation, a man who once had a vested right to proper notice and hearing prior to suspension can now be perfunctorily placed in a permanent state of limbo. Yet, in the court's eyes, he will still be deemed to have been afforded the necessary due process. Under the circumstances, it is imperative that the Court grant the petition in order that the due process question may be resolved.

CONCLUSION

For the foregoing reasons, we respectfully urge that the petition for a writ of certiorari herein sought should be granted.

Respectfully submitted,

JOHN HENRY BREBBIA
DELMAR W. HOLLOMAN
Counsel for Petitioner
1000 Vermont Avenue, N. W.
Washington, D. C. 20005